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IN THE

Supreme Court of the United States

October Term, 1941.

No. 516.

GEORGE H. WHITELEY, JR.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

FREDERICK H. SPOTTS,
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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

The Petition of George H. Whiteley, Jr., respectfully represents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decision affirming a decree of the Board of Tax Appeals. The case presented to the Board and the Court below involved two issues, wholly unrelated. This petition is limited to the questions raised by the Second Issue only, described in the Opinion below as "Trusts for Minor Children."

Summary Statement of Matter Involved.

All of the facts were stipulated and read as follows:

"1. Under date of June 12, 1935, George H. Whiteley, Jr., executed four trusts wherein The First National Bank of York was Trustee—one for the benefit

of each of his four children, George H. Whiteley, III, Morgan S. Whiteley, Purdon B. Whiteley and Virginia Whiteley. A true and correct copy of one of the aforesaid deeds of trust is introduced in evidence. The other trusts are identical.

"2. The total income of all four trusts for the calendar year 1935 was $5,878.00.

"3. Of the aforementioned total income of $5,878.00, all except the sum of $450.00 remained in the trusts, was reinvested and became a part of the corpus of the trust estates.

"4. The balance of $450.00 was paid to George H. Whiteley, Jr., and was invested by him for the children in forty shares of Empire Power Company preferred stock. The total purchase price of the forty shares was $2,727.06, the balance of the purchase price coming from savings accounts of the children.

"5. Of the forty shares of Empire Power Company preferred stock, ten shares were issued to and registered in the name of each child."

The foregoing facts plus the deed of trust (a copy of which, for convenient reference, is added to this Petition at page 19) are everything necessary to an understanding of the issues involved. They are all of the evidence and facts which the Board of Tax Appeals and the Circuit Court of Appeals had before them. They present the question, whether the income from the trusts is taxable to the grantor although no part of the income was used for the maintenance, education, or support of the grantor's minor children.

At the time these trusts were set up, the petitioner transferred and set over to the Trustee, to wit, The First National Bank of York, Pennsylvania, 1,000 shares of the

common stock of the Dentists' Supply Company of New York in each trust. The trust instrument provides that the income from the trust is to be paid to the donor as, if and when ordered in writing by him to do so during the minority of the particular child for whom the trust was set up, to be used solely and entirely by him for his or her support, maintenance, education and enjoyment. Each trust instrument further provides that if any income is accumulated and not distributed during the minority of the said minor child, such income shall be invested in securities if ordered and approved by the donor and become part of the corpus of the said trust. Upon each child attaining the age of twenty-one years, the Trustee shall distribute and pay over direct to the said child the income from said trust fund and any of the corpus, in such amounts and at such times as the donor in writing orders such distribution or distributions to be made. If the donor predeceases his wife, she is given the same rights as to ordering and directing distribution of the corpus and income of the said trusts. Following the death of the survivor of the donor and his wife, the Trustee is directed to make certain distributions to the said child for life, and upon his or her death, provision is made for the distribution of same to her children, or brothers, or sisters, if no children. Each of these trusts is irrevocable and under no conditions do the trust investments revert either in principal or interest to the donor, nor is there any power reserved in the said trusts in favor of the donor to receive the income therefrom except during the minority of each of the children, and if the donor elects in writing that the Trustee pay all or any of the income to him during the minority of any of the children, it must be used solely and entirely by him for his or her support, maintenance, education and enjoyment.

The total income of all four trusts for the calendar year 1935 was $5,878.00. Of this total income of $5,878.00, all except $450 remained in the trusts and was invested and became part of the corpus of the four trust estates. Only $450 was paid to the donor, and this was not expended by him for the support, maintenance, education and enjoyment of his four minor children, but was invested by him for the children in forty shares of Empire Power Company preferred stock. The total purchase price of the forty shares was $2,727.06, the balance of the purchase price coming from savings accounts of the four children. These shares were issued in lots of ten to each child, so that ten shares were actually registered in the name of each child. Accordingly, none of the income of the four trusts was used by the donor in 1935 for the support, maintenance, education, and enjoyment of the said four minor children.

Although the petitioner received none of the income of the four trusts for his personal use and none of it was used by him to discharge any legal obligation for the support of his minor children, the Commissioner taxed him with the full sum of $5,878.00 representing the total income of the four trusts. The action of the Commissioner was upheld by the Board of Tax Appeals although six members dissented and by the Circuit Court of Appeals.

Reasons Relied on for Allowance of Writ.

1. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the 1st Circuit in *Higgins v. White,* 93 F. (2d) 357 (1937), a statement believed to be true as to the issue involved in this case although the Circuit Court of Appeals for the 1st Circuit reached a result opposite to its first decision upon another ground in 116 F. (2d) 312.

2. The decision of the court below is in conflict with several decisions of the Board of Tax Appeals referred to in the brief in support of this petition.

3. The court below clearly misconceived the decision of this court in *Helvering v. Horst*, 311 U. S. 112, in holding that case as "most conclusive" on the question involved; although the *Horst* case merely taxed the owner of a bond upon the money paid as interest on the bond in the year of its collection and although, the year before, the owner had clipped the coupon and given it as a gift to his son. The case, of course, has no application to a situation where the owner of a bond makes a gift of the bond itself, as well as the coupons attached to it—an obvious difference between the *Horst* case and the case at bar which escaped the court.

4. The court below has held that although a donor may have made an irrevocable gift of securities in trust, the income may nevertheless be taxable to him for no other reason than he gets a certain mental satisfaction out of having made the gift ;and finds justification for the conclusion in the decisions of this court particularly *Helvering v. Horst*—a doctrine so novel and far reaching that it ought to be reviewed by this court especially since it is charged with being its author. The exact language of the court is as follows:

> "In this case the settlor of these trusts by its terms could have received its income and applied it to the support of his minor children. He did not choose to do so, but left it to accumulate for them. He controlled the use of the money and had the same nonmaterial satisfaction as that of the taxpayer in the Horst case."

WHEREFORE, your petitioner prays that this petition be granted and that this court issue a Writ of Certiorari di-

rected to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this court for its review a full and complete transcript of the record and all proceedings in the case entitled on its docket "No. 7620, George H. Whiteley, Jr., Petitioner, v. Commissioner of Internal Revenue, Respondent."

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